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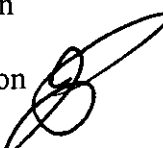
For Meeting of: 10-09-03


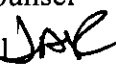
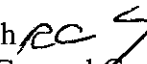


SUBMITTED LATE

October 3, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel
James Kahl 
Deputy General Counsel
Rosemary C. Smith 
Acting Associate General Counsel
Mai T. Dinh 
Acting Assistant General Counsel
Robert M. Knop 
Attorney

SUBJECT: Draft AO 2003-23

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 9, 2003.

Attachment

DRAFT

1 ADVISORY OPINION 2003-23

2
3 Joseph E. Sandler, Esq.

4 Neil P. Reiff, Esq.

5 Sandler, Reiff & Young, P.C.

6 50 E Street, S.E.

7 Suite 300

8 Washington, DC 20003

9
10 Dear Messrs. Sandler and Reiff:

11
12 This responds to your letter of July 25, 2003, requesting an advisory opinion on
13 behalf of WE LEAD Women Engaged in Leadership, Education, and Action in
14 Democracy ("WE LEAD"), concerning the application of the Federal Election Campaign
15 Act of 1971, as amended ("the Act"), and Commission regulations, to the earmarking,
16 collection, and forwarding of contributions from individual donors to the presumptive
17 Democratic Presidential nominee.

18 ***Background***

19 You state that WE LEAD is a non-connected, Federal political committee that has
20 not been established, financed, maintained, or controlled by any political party committee,
21 other political committee, or any candidate for any Federal office. WE LEAD registered
22 with the Commission on July 17, 2003.

23 You indicate that WE LEAD plans to solicit and accept contributions up to \$2,000
24 from individuals who would earmark such contributions to the "presumptive nominee" of
25 the Democratic Party ("Party") for the office of President of the United States. You
26 define the "presumptive nominee" as the candidate who, no later than 5:00 P.M. Eastern
27 Daylight Time ("EDT") on the seventh day prior to the start of the 2004 Democratic
28 National Convention, has received enough pledged delegates to win nomination on the

1 first ballot at the 2004 Democratic National Convention. The pledged delegates must be
2 registered with and certified by the Secretary of the Democratic National Committee
3 (“DNC”).

4 You state that WE LEAD plans to forward all earmarked contributions to the
5 primary committee of such presumptive nominee as soon as the nominee is identified, but
6 not later than July 20, 2004, which is the sixth day prior to the scheduled start of the 2004
7 Democratic National Convention. You indicate that if no presumptive nominee has been
8 identified by 5:00 P.M. EDT on July 19, 2004, WE LEAD plans to forward the
9 earmarked contributions to the DNC. You indicate that if the contributions are forwarded
10 to the DNC, they will not be forwarded to any candidate for President or other Federal
11 office.

12 You state that, in soliciting the earmarked contributions, WE LEAD plans to
13 inform prospective contributors that their contributions are being earmarked, pursuant to
14 11 CFR 110.6(b), and that the presumptive nominee who receives the contribution will be
15 publicly identified on WE LEAD’s disclosure reports. You also state that prospective
16 contributors will be informed that any earmarked contributions must be limited to \$2,000.
17 In addition, you indicate that each prospective contributor will be informed that if he or
18 she has made other contributions to the committee that receives his or her earmarked
19 contribution (*e.g.*, the presumptive nominee’s authorized committee or the DNC), those
20 contributions will be aggregated with his or her earmarked contribution and any amount
21 exceeding the relevant contribution limit will be refunded by the recipient committee.

22 You also indicate that all disclaimers required by Commission regulations with
23 respect to WE LEAD’s solicitation of contributions will be included in all solicitations.

1 You further indicate that WE LEAD understands, and will communicate to the
2 presumptive nominee's primary committee, that the earmarked contributions would not
3 qualify for matching funds under the Presidential Primary Matching Payment Account
4 Act pursuant to 11 CFR 9034.3(f).

5 You state that WE LEAD plans to identify each contribution as earmarked for the
6 "presumptive nominee" on its disclosure report for the reporting period in which each
7 such earmarked contribution was received, in accordance with 11 CFR 110.6(c)(1)(ii).

8 You also state that, at the time the earmarked contributions are forwarded to the
9 presumptive nominee's campaign committee, WE LEAD plans to send the recipient
10 committee a check from WE LEAD for the total amount of all earmarked contributions
11 along with a report containing all required information with respect to each earmarked
12 contribution in accordance with 11 CFR 110.6(c)(1)(i), (iii) and (iv). Finally, you
13 indicate that WE LEAD plans to report the disbursement of the earmarked contributions
14 to the recipient committee on its disclosure report for the reporting period during which
15 the disbursement was made.

16 ***Question Presented***

17 *May WE LEAD accept earmarked contributions from individuals to be forwarded*
18 *to the Party's presumptive nominee for the office of President of the United States or to*
19 *the Democratic National Committee outside of the time periods established by 2 U.S.C.*
20 *432(b)?*

21 ***Legal Analysis and Conclusions***

22 No, WE LEAD's proposal must be restructured to comply with the timely
23 forwarding requirements of 2 U.S.C. 432(b) and 11 CFR 102.8.

1 1. *Earmarking contributions to the presumptive nominee's authorized committee*

2 The Act provides for the earmarking of contributions “made by a person, either
3 directly or indirectly, on behalf of a particular candidate.” 2 U.S.C. 441a(a)(8). All
4 contributions by a person that are made on behalf of, or to, a candidate, including
5 contributions that are in any way earmarked or otherwise directed to the candidate
6 through an intermediary or conduit, are contributions from the person to the candidate.
7 2 U.S.C. 441a(a)(8); 11 CFR 110.6(a). If the intermediary or conduit exercises any
8 direction or control over the contributions, however, the contributions are treated as
9 contributions from both the original contributors and from the intermediary or conduit to
10 the recipient committee. 11 CFR 110.6(d). The Commission’s regulations define
11 “earmarked” as “a designation, instruction, or encumbrance, whether direct or indirect,
12 express or implied, oral or written, which results in all or any part of a contribution or
13 expenditure being made to, or expended on behalf of, a clearly identified candidate or a
14 candidate’s authorized committee.” 11 CFR 110.6(b)(1). Earmarked contributions must
15 be forwarded to the candidate or the candidate’s authorized committee in accordance with
16 11 CFR 102.8. 11 CFR 110.6(b)(2)(iii).

17 Section 432(b) of the Act and Commission regulations at 11 CFR 102.8(a)
18 implementing the FECA require that persons who receive contributions on behalf of an
19 authorized committee must forward the contributions to the treasurer no later than 10
20 days after receiving them. If the contribution exceeds \$50, the name and address of the
21 contributor and the date of receipt must be forwarded with the contribution, and, if the
22 contribution exceeds \$200, the contributor’s employer and occupation must also be
23 forwarded. The date of receipt of the contribution is the date that the person receiving the

1 contribution obtains possession. 11 CFR 102.8(a). The Act and Commission regulations
2 also require the intermediary or conduit to report the original source and the intended
3 recipient of an earmarked contribution to the Commission and to the intended recipient.
4 2 U.S.C. 441a(a)(8); 11 CFR 110.6.

5 *A. Unidentified Candidate*

6 As noted above, the Commission's regulations define an earmarked contribution,
7 in part, as one that is made to a "clearly identified candidate or a candidate's authorized
8 committee." 11 CFR 110.6(b)(1). The Commission has interpreted this regulation to
9 allow contributions to be earmarked for an undetermined Federal candidate in certain,
10 limited circumstances. In Advisory Opinion 1982-23, the Commission concluded that it
11 was permissible for a local committee to earmark \$1,000 through a local party committee
12 to the as-yet unknown Republican nominee for New York's 24th Congressional District.
13 In Advisory Opinion 1977-16, the Commission concluded that it was permissible for a
14 local committee to accept contributions and make expenditures on behalf of an
15 undetermined Federal candidate. In both instances, the Commission concluded that it
16 was permissible to earmark contributions to undetermined Federal candidates because the
17 candidates were identifiable as to specific office, party affiliation, and election cycle,
18 although the names of the eventual nominees were not known.

19 Under WE LEAD's proposal, because the "presumptive nominee" is identifiable
20 as to specific office (President of the United States), party affiliation (Democratic Party),
21 and election cycle (2004), the Commission concludes that individual contributors may
22 earmark contributions to the primary committee of the "presumptive nominee" through

1 WE LEAD, as long as the earmarked contributions are forwarded to the treasurer of the
2 presumptive nominee's authorized committee consistent with the requirements of
3 2 U.S.C. 432(b)(2) and 11 CFR 102.8(a).

4 *B. Timing*

5 Generally, contributions earmarked for a candidate must be forwarded to the
6 authorized committee's treasurer within 10 days of receipt. 2 U.S.C. 432(b)(2) and
7 11 CFR 102.8(a). In a limited number of exceptional circumstances, however, the
8 Commission has concluded that the timing requirements of 11 CFR 102.8 did not apply.¹
9 In Advisory Opinion 1999-33, a corporation failed to forward contributions to its separate
10 segregated fund from employees using payroll deductions within the prescribed
11 timeframe due to problems with its conversion to a centralized payroll system. The
12 Commission permitted the corporation to forward the contributions to the SSF's treasurer
13 outside the 10- or 30-day time period to remedy the apparent violation. However, the
14 Commission cautioned the requestor that despite this remedial action, the Commission
15 may examine the situation in an enforcement context. Moreover, the advisory opinion
16 stated that "[t]he remedial action proposed should not be viewed as a precedent for any
17 other situation entailing a delayed transmittal of contributed funds."

18 The Commission also allowed contributions to be forwarded outside the 10- or
19 30-day time period where a court-appointed Federal monitor prevented the forwarding of
20 such contributions within the prescribed timeframe. Advisory Opinion 1998-25. That

¹ The Commission notes that 2 U.S.C. 432(b) and 11 CFR 102.8 did not become part of the Act and Commission regulations until 1980. *See* Federal Election Campaign Act, Pub. L. No. 96-187, 93 Stat. 1339-69 (1980); *Explanation and Justification for Amendments to Federal Election Campaign Act of 1971*, 45 Fed. Reg. 15,080 (Mar. 7, 1980). Accordingly, neither section 432(b) nor 11 CFR 102.8 was considered in the Commission's decision in Advisory Opinion 1977-16.

1 advisory opinion is distinguishable from the facts you present because your request does
2 not involve an intervening act by a court-appointed officer that would prevent WE LEAD
3 from forwarding the contributions in accordance with 2 U.S.C. 432(b) and 11 CFR 102.8.

4 The circumstances you present are more similar to those described in Advisory
5 Opinion 1995-15. In that advisory opinion, the Commission allowed a separate
6 segregated fund (“SSF”) to receive and hold earmarked contributions from employees for
7 a long period of time prior to forwarding those contributions to the authorized committees
8 designated by the employees under a deferred earmarking program. Under 11 CFR
9 114.2(f)(2)(iii) and (f)(4)(iii), a corporation or labor organization may use payroll
10 deductions to collect contributions from employees that are earmarked for candidates if
11 they are treated as contributions by the employees to both the corporation’s SSF and the
12 candidate, and are also treated as contributions from the SSF to the candidate. The
13 underlying rationale for this approach in the regulations is that the SSF exercises direction
14 and control over the earmarked contributions from employee payroll deductions. *Cf.*,
15 *Final Rules on Corporate and Labor Organization Activity; Express Advocacy and*
16 *Coordination with Candidates*, 60 Fed. Reg. 64260, 64265 (Dec. 14, 1995). You
17 indicate, however, that WE LEAD is not an SSF and will not exercise direction or control
18 over the earmarked contributions. Thus, your request is distinguishable from the facts
19 presented in Advisory Opinion 1995-15. If WE LEAD wishes to operate a deferred
20 earmarking program as described in Advisory Opinion 1995-15, it would be considered to
21 be exercising direction and control over the earmarked contributions and contributions
22 forwarded to the presumptive nominee would, accordingly, be subject to WE LEAD’s
23 contribution limit to candidates.

1 You cite Advisory Opinion 1982-23 in support of your request. In that advisory
2 opinion, the Commission suspended the requirements of 11 CFR 102.8 until the name of
3 the Federal candidate was known. Advisory Opinion 1982-23, footnote 2. The footnote,
4 however, does not provide the basis for determining that the Commission has the
5 authority to suspend the statutory requirement in 2 U.S.C. 432(b) that 11 CFR 102.8
6 implements. To the extent that Advisory Opinion 1982-23 indicates that the Commission
7 has the authority to suspend prospectively the requirements of 2 U.S.C. 432(b) and
8 11 CFR 102.8 regarding the timely transmittal of contributions, that advisory opinion is
9 hereby superseded.

10 WE LEAD's program to solicit, collect and forward earmarked contributions must
11 comply with 2 U.S.C. 432(b) and 11 CFR 102.8. The Commission recognizes that some
12 of the contributions WE LEAD receives will be received within 10 days of the date on
13 which WE LEAD transmits them to the presumptive nominee and some will be received
14 outside of that timeframe. We first consider the requirements of 2 U.S.C. 432(b) and 11
15 CFR 102.8 with respect to contributions received within 10 days of transmittal and then
16 analyze the requirements applicable to contributions received outside that timeframe.

17 All earmarked contributions received by WE LEAD within 10 days of transmittal
18 to the presumptive nominee will be treated as contributions from the original contributors
19 to the presumptive nominee's primary committee. Therefore, the contributions will not
20 be treated as contributions by WE LEAD to the presumptive nominee's primary
21 committee. Under the facts you present, WE LEAD's discretion will be severely limited
22 as to the decision regarding the ultimate recipient of the earmarked contributions.

1 After WE LEAD forwards the earmarked contributions to the presumptive
2 nominee, it must report the source and disbursement of each earmarked contribution on
3 its reports for the reporting period in which the earmarked contributions were received
4 and disbursed. 11 CFR 110.6(c)(1). The reports must identify each earmarked
5 contribution as earmarked for the presumptive nominee. In addition, at the time WE
6 LEAD forwards the earmarked contributions to the presumptive nominee's primary
7 committee, it must also send the committee a report containing all required information
8 with respect to each earmarked contribution pursuant to 11 CFR 110.6(c)(1)(i), (iii), and
9 (iv).

10 The Commission notes that the treasurer of the presumptive nominee's primary
11 committee must review each earmarked contribution to determine whether the aggregate
12 amount of the contributor's contributions to the committee exceeds the individual
13 contribution limit in 2 U.S.C. 441a(a)(1) and 11 CFR 110.1. 11 CFR 103.3(b). The
14 authorized committee must refund any excessive contribution to the contributor within
15 sixty days of receiving the contribution or must seek redesignation or reattribution of the
16 contribution in accordance with 11 CFR 110.1(b), 110.1(k), or 110.2(b). 11 CFR
17 103.3(b)(3). The Commission also notes that all contributions earmarked for the
18 presumptive nominee's primary committee will be ineligible for primary matching funds
19 under 11 CFR 9034.3(f).

20 Any contributions received by WE LEAD outside of the 10-day timeframe must
21 be treated as contributions to WE LEAD. Such contributions would be subject to the
22 \$5,000 annual contribution limit under 2 U.S.C. 441a(a)(1)(C) and reporting requirements
23 of 2 U.S.C. 434. WE LEAD must report the contributions on the disclosure report

1 covering the reporting period during which each contribution was received. WE LEAD
2 may contribute up to the applicable limit to the presumptive nominee.² It may also use
3 the remaining contributions for any other purposes that are consistent with the Act and
4 Commission regulations.

5 In soliciting contributions, WE LEAD should inform prospective contributors that
6 any contributions received by WE LEAD within 10 days of when the presumptive
7 nominee is identified will be earmarked for the presumptive nominee's primary
8 committee and that contributions received outside of that timeframe will be considered
9 unearmarked contributions to WE LEAD. Prospective contributors should be informed
10 that all earmarked contributions will be publicly identified on the presumptive nominee's
11 and WE LEAD's disclosure reports. With respect to contributions earmarked for the
12 presumptive nominee, WE LEAD should inform prospective contributors that earmarked
13 contributions forwarded to the presumptive nominee will be considered contributions
14 from the original contributors to the presumptive nominee, assuming that WE LEAD
15 does not exercise any direction or control over the contributions. Prospective
16 contributors, accordingly, should be informed that any contributions earmarked through
17 WE LEAD to the presumptive nominee are subject to the \$2,000 contribution limit. WE
18 LEAD should also inform prospective contributors that such earmarked contributions will
19 be aggregated with all other contributions that they may have made to the presumptive

20

² If WE LEAD qualifies as a multicandidate political committee, its contribution limit is \$5,000 per election. 2 U.S.C. 441a(a)(2); 11 CFR 110.2(b)(1). Otherwise, its contribution limit is \$2,000 per election. 2 U.S.C. 441a(a)(1); 11 CFR 110.2(b)(1). If the presumptive nominee accepts public funding for the general election, WE LEAD may also contribute \$2,000 to the presumptive nominee's general election legal and accounting compliance fund. See 11 CFR 9003.3.

1 nominee. Contributors should also be told that any amount that exceeds the \$2,000
2 contribution limit must be refunded by the presumptive nominee's primary committee.

3 With respect to contributions that are considered contributions to WE LEAD, WE
4 LEAD should inform prospective contributors that such contributions are subject to the
5 \$5,000 per year contribution limit. WE LEAD should also inform prospective
6 contributors that such contributions will be aggregated with all other contributions they
7 may have made to WE LEAD in the same calendar year. Contributors should also be told
8 that any amount that exceeds the \$5,000 contribution limit must be refunded by WE
9 LEAD.

10 2. *Earmarking contributions to the DNC*

11 Neither the Act nor Commission regulations specifically address contributions
12 earmarked to political committees that are not authorized committees of candidates. *See*
13 2 U.S.C. 441a(a)(8) and 432(b); 11 CFR 110.6. The Commission has held that this
14 omission does not bar such earmarking, but that it would be subject to other regulations
15 concerning the receipt of contributions by any person on behalf of a political committee.
16 Advisory Opinions 1983-18 and 1981-57. Section 432(b) of the Act and Commission
17 regulations at 11 CFR 102.8(b) implementing the FECA require persons who receive a
18 contribution in excess of \$50 on behalf of an unauthorized committee to forward the
19 contribution, as well as the contributor's name, address, and receipt date, to the treasurer
20 no later than 10 days after receipt. 2 U.S.C. 432(b)(2)(B); 11 CFR 102.8(b)(2). If the

1 contribution exceeds \$200, the contributor's employer and occupation must also be
2 forwarded. 11 CFR 102.8(b)(2). Contributions of \$50 or under to unauthorized
3 committees must be forwarded within thirty days (with no information forwarding
4 requirement). 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b)(1).

5 Because the DNC is not an authorized committee of any candidate, if WE LEAD
6 forwards the contributions to the DNC, then the time period in which WE LEAD must
7 forward each earmarked contribution would depend on the size of the contribution: (1)
8 contributions of \$50 or less must be forwarded to the treasurer of the DNC within 30 days
9 of receipt; and (2) contributions over \$50 must be forwarded to the treasurer of the DNC
10 within 10 days of receipt. The date of receipt is the date that WE LEAD obtains
11 possession of the contribution. *See* 11 CFR 102.8(b)(2).

12 The analysis for forwarding earmarked contributions to the DNC is the same as
13 the analysis above for earmarked contributions to the presumptive nominee's primary
14 committee. Consequently, WE LEAD may transmit to the DNC only those earmarked
15 contributions it receives within 10 days or 30 days of the transmittal depending on
16 whether or not the contributions exceed \$50. *See* 2 U.S.C. 432(b) and 11 CFR 102.8.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
20 any of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this opinion, then the requestor may not rely on that conclusion as
2 support for its proposed activity.

3
4 Sincerely,
5
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8

9 Ellen L. Weintraub
10 Chair
11

12
13 Enclosures (AOs 1999-33, 1998-25, 1995-15, 1983-18, 1982-23, 1981-57 and 1977-16)